STATE OF MICHIGAN
IN THE SUPREME COURT

In re Request for Advisory Opinion
Regarding Constitutionality of 2011 PA 38. Supreme Court No. 143157

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The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

CORRECTED BRIEF OF ATTORNEY GENERAL

ARGUING THAT 2011 PA 38 IS UNCONSTITUTIONAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS

The questions submitted are as follows:

I. Whether reducing or eliminating the statutory exemption for public-pension incomes as described in MCL 206.30, as amended, impairs accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24.

II. Whether reducing or eliminating the statutory tax exemption for pension incomes, as described in MCL 206.30, as amended, impairs a contract obligation in violation of Const 1963, art 1, § 10 or the US Const, art I, § 10(1).

III. Whether determining eligibility for income-tax exemptions and deductions on the basis of total household resources as described in MCL 206.30(7) and (9), as amended, creates a graduated income tax in violation of Const 1963, art 9, § 7.

IV. Whether determining eligibility for income-tax deductions on the basis of date of birth, as described in MCL 206.30(9), as amended, violates equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution.

INTRODUCTION

The sweeping changes to the Michigan tax scheme to address Michigan's fiscal issues in 2011 PA 38 may be well-intentioned, but its revisions to the tax obligations for public pensions are fundamentally flawed in four different respects.

First, Public Act 38 of 2011 violates art 9, § 24 by reducing the accrued financial benefits of public employees. This Constitutional provision is designed to guarantee that public employees can rely on a specific level of retirement benefits for work that they have already performed, and that the Legislature cannot reduce this level after the rights have accrued. In MCL 206.30, the Legislature has provided that income from pension benefits is deductible from state income taxes. This right vests once the retirement benefits for public employees accrue, and is then enforceable under art 9, § 24. The same is true for the five specific statutes that govern approximately half of all public employees – State employees, public school employees, city library employees, legislative members, and judges – shielding their retirement income from any taxation. By eliminating these protections and applying Michigan's income tax to the pension benefits that have already accrued, the Legislature is reducing the pension income for public employees in violation of art 9, § 24. The Act reduces post hoc the benefits of public employees despite their reliance on a certain level of income.

Second, the fact that the Legislature has gone back on its deal with public employees also violates their constitutional right to be free from an impairment of contract. The Constitution makes clear that this right shielding the specific level of benefits from reduction is contractual in nature. Reducing this income after the work has been performed violates this contractual obligation, and the impairment is substantial. A public employee born after 1952 receiving $20,000 a year in retirement will now have to pay $870 per year in income taxes before reaching the age of 67, not considering other income and deductions. This is substantial.

Third, Public Act 38 of 2011 also violates art 9, § 7 by creating a graduated tax base. The Legislature has conditioned the receipt of an exemption and a deduction from income taxes on whether the "total household resources" – essentially income – are below $75,000 for a single person in certain circumstances. There are no other exemptions or deductions in Michigan for which eligibility is based on income. By forbidding a graduated tax base, art 9, § 7 forbids these distinctions based on income because they effectively create a graduated tax by graduating the base of the taxpayer. A retired employee who pays 4.35% income tax on an income base of $75,000 and does not qualify for the deduction pays a higher ultimate proportional tax burden than someone who pays 4.35% income tax on an income base of $30,000, reduced from $50,000 as a consequence of qualifying for the deduction. The Michigan Constitution does not allow these distinctions.

Fourth, determining eligibility for income tax exemptions on the basis of date of birth and marital status (since a pensioner who is otherwise ineligible for a full exemption becomes eligible based on the birth date of a spouse born before 1946), as described in MCL 206.30(9), as amended, violates equal protection of the laws under our state constitution. Under the strict scrutiny standard, which applies because the right to an undiminished pension income is guaranteed by art 9, § 24 of our state constitution, the State has not asserted a compelling interest and the classifications it has created are not narrowly tailored to accomplish its asserted goals. Alternatively, even if the rational basis standard applies, the State's discrimination by birth date and marital status violates both state and federal equal protection guarantees because there is no conceivable set of facts that can justify the Legislature's discrimination based on date of birth or marital status.

The effort to tax the pension income of public employees must be revised to apply only to new public employees and to existing employees whose financial benefits have not accrued, and to eliminate the qualifications on a public employee's eligibility to receive deductions or exemptions based on household resources, date of birth, or marital status.

STATEMENT OF THE CASE

On May 25, 2011, Governor Rick Snyder signed into law a series of bills that comprised the Fiscal Year 2012 budget. Public Act 38 of 2011, as well as Public Acts 39 through 45 of 2011, enacted significant changes to the Income Tax Act of 1967, the Michigan Business Tax, and the Multistate Tax Compact, respectively.[1]

Enrolled House Bill 4361, now 2011 PA 38, amended the Income Tax Act of 1967 by eliminating numerous tax credits, deductions, and exemptions. Over the years, the Legislature created many public pension and retirement systems for different groups of public employees. For the past 40 years, the pension benefits of these employees were exempt from state income tax, either by operation of a statutory

[1] For an overview of the budget plan, the Court may find it helpful to review the report issued by the Citizens Research Council of Michigan at http://crcmich.org/PUBLICAT/2010s/2011/sbn2011-01.pdf.

exemption, or through the availability of a deduction under the Income Tax Act of 1967, as amended in 1969.[2]

With respect to statutory exemptions, five public pension plans had benefitted from general exemptions from taxation, including the state income tax. Before their recent amendment, these statutes exempted the pension benefits of these public employees from state and local taxation.

The State Employees' Retirement Act, MCL 38.40(1), which first included the exemption in 1943 PA 20, provided:

> The right of a person to a pension, an annuity, a retirement allowance, any optional benefit, any other right accrued or accruing to any person under the provisions of this act, the various funds created by this act, and all money and investments and income of the funds *are exempt from any state, county, municipal or other local tax*, and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or other process of law, and shall be unassignable except as otherwise provided in this act. [Emphasis added.][3]

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[2] While Michigan did not adopt an income tax until 1967, many proposals to do so were advanced before that time, including failed amendments to the 1908 Constitution in 1922, 1924, 1934, and 1939. See Publication by House Fiscal Agency, Income Tax, State of Michigan, April 1999, at http://house.michigan.gov/hfa/PDFs/inco_tax.pdf.

[3] This exemption pertains to state employees participating in the defined benefits plan (or Tier 1 plan), MCL 38.1 through 38.49. However, in 1996 PA 486 the Legislature created a new defined contribution retirement plan (or Tier 2) for new state employees hired after March 1997, MCL 38.50 through MCL 38.69. The State Employees Retirement Act exempts distributions to state defined contribution participants as well, see MCL 38.69, but this section was not amended to eliminate the exemption created in the plan.

The Public School Employees Retirement System Act, MCL 38.1346(1), which first included the exemption in 1945 PA 136, provided:

> A retirement allowance, an optional benefit, or any other benefit accrued or accruing to a person under this act, the reserves created by this act, and the money, investments, or income of those reserves are *exempt from state, county, municipal, or other local tax* and subject to the public employee retirement benefit protection act. [Emphasis added.]

The Michigan Legislative Retirement System Act, MCL 38.1057(1), which first included the exemption in 1957 PA 261, provided:

> All retirement allowances and other benefits payable under this act and all accumulated credits of members, deferred vested members, and retirants in this retirement system *are not subject to taxation by this state or any political subdivisions of this state.* [Emphasis added.]

The City Library Employees' Retirement System Act, MCL 38.705, which first included the exemption in 1927 PA 39, provided:

> When a system of retiring allowances is adopted under the provisions of this act, the reserve fund thereby provided *shall be free from all state, county, township, city, village and school district taxes* and the annuities payable to the members of the staff shall likewise be free from all such taxes. [Emphasis added.]

And the Judges Retirement Act of 1992, MCL 38.2670(1), which first included the exemption in 1996 PA 523, provided:

> *Distributions* from employer contributions made pursuant to section 714(2) and (3) [defined benefits] and earnings on those employer contributions, and distributions from employee contributions made pursuant to section 714(3) [defined contributions] and earnings on those employee contributions, *are exempt from any state, county, municipal, or other local tax*. [Emphasis added.]

Thus, each of these pension plans had an express exemption embedded within the pension plan's statutory language regarding exemption from state taxes. All of these Acts were amended to remove the statutory exemption from state taxes consistent with Public Act 38. See 2011 PA 41; 2011 PA 42; 2011 PA 43; 2011 PA 44; and 2011 PA 45.[4]

In contrast, at least four statutory public pension plans do not contain an express exemption from taxation. See Fire Fighters and Police Officer Retirement Act, MCL 38.551 *et seq*; Municipal Employees' Retirement Act, MCL 38.1501 *et seq*; State Police Retirement Act, MCL 38.1601 *et seq*; and the County Pension Plan Act, MCL 46.12a.

Retired employees under these plans could deduct their retirement income or allowances under the Income Tax Act of 1967, as amended by 1969 PA 332. MCL 206.30(1)(f) formerly provided:

> "Taxable income" means . . . adjusted gross income as defined in the internal revenue code subject to the following adjustments under this section:
>
> * * *
>
> (f) *Deduct* the following to the extent included in adjusted gross income:
>
> (*i*) *Retirement or pension benefits received* from a federal public retirement system or *from a public retirement system of or created by this state or a political subdivision of this state.* [MCL 206.30(1)(f) (emphasis added).]

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[4] For example, as amended by 2011 PA 41, MCL 38.40 now provides, in part:
(1) *Except as otherwise provided in this section*, the right of a person to a pension, an annuity, a retirement allowance, and any optional benefit and any other right accrued or accruing to any person under the provisions of this act, the various funds created by this act, and all money and investments and income of the funds are exempt from any state, county, municipal, or other local tax.

(2) *Beginning January 1, 2012, the right of a person to a pension, an annuity, a retirement allowance, and any optional benefit, and any other right accrued or accruing to any person under the provisions of this act, is subject to state tax upon distribution to the person from the various funds created by this act.* [Emphasis added.]

Thus, since 1969, retired employees in public pension plans lacking an express statutory exemption obtained a similar benefit through application of the deduction set forth in MCL 206.30(1)(f) of the Income Tax Act.

All of this changed when House Bill 4361 became law. Pertinent to this matter, Public Act 38 of 2011 amended the definition of "taxable income" and modified the deductions for pension and retirement income under MCL 206.30. MCL 206.30(1)(f) now provides that the deduction for retirement benefits is "subject to the limitations and restrictions set forth in subsection (9)."[5] MCL 206.30(9), a new section, sets forth a formula for determining whether and how much income or allowance from a pension plan may be deducted under MCL 206.30(1)(f) based on date of birth and household resources:

> (9) In determining taxable income under this section, the following limitations and restrictions apply:
>
> (a) For a person born before 1946, this subsection provides no additional restrictions or limitations under subsection (1)(f).
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> (b) For a person born in 1946 through 1952, the sum of the deductions under subsection (1)(f)(*i*), (*ii*),[6] and (*iv*)[7] is limited to $20,000.00 for a

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[5] MCL 206.30 provides additional deductions for pension benefits of the armed forces and railroad employees in subsection (1)(e). The section also provides a definition of "retirement or pension benefits" for purposes of (1)(f) that includes "distributions" from various qualifying plans or systems. MCL 206.30(8).
[6] MCL 206.30(1)(f)(ii) provides a deduction for "[r]etirement or pension benefits received from a public retirement system of or created by another state or any of its political subdivisions if the income tax laws of the other state permit a similar deduction or exemption or a reciprocal deduction or exemption of a retirement or pension benefit received from a public retirement system of or created by this state or any of the political subdivisions of this state."
[7] MCL 206.30(1)(f)(iv) provides a deduction for *private* or other retirement or pension benefits up to a maximum amount for single ($42,240) and joint filers ($84,480), as reduced by other deductions.

single return and \$40,000.00 for a joint return. After that person reaches the age of 67, the deductions under subsection (1)(f)(*i*), (*ii*), and (*iv*) do not apply and that person is eligible for a deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. However if that person's total household resources exceed \$75,000.00 for a single return or \$150,000.00 for a joint return, that person is not eligible for a deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return. A person that takes the deduction under subsection (1)(e) is not eligible for the unrestricted deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return under this subdivision.

(c) For a person born after 1952, the deduction under subsection (1)(f)(*i*), (*ii*), or (*iv*) does not apply. When that person reaches the age of 67, that person is eligible for a deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. If a person takes the deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return, that person shall not take the deduction under subsection (1)(f)(*iii*)[8] and shall not take the personal exemption under subsection (2). That person may elect not to take the deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return and elect to take the deduction under subsection (1)(f)(*iii*) and the personal exemption under subsection (2) if that election would reduce that person's tax liability. However, if that person's total household resources exceed \$75,000.00 for a single return or \$150,000.00 for a joint return, that person is not eligible for a deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return. A person that takes the deduction under subsection (1)(e) is not eligible for the unrestricted deduction of \$20,000.00 for a single return and \$40,000.00 for a joint return under this subdivision.

(d) For a joint return, the limitations and restrictions in this subsection shall be applied based on the age of the older spouse filing the joint return. [MCL 206.30(9).]

Thus, MCL 206.30(9) imposes different tax treatment of public pension income and allowances depending upon the retirant's date of birth and marital status at the time of filing the tax return and the retirant's household resources. For those born

[8] MCL 206.30(1)(f)(iii) provides a deduction for "Social security benefits as defined in section 86 of the internal revenue code."

before 1946, there will be no change in their deduction for pension benefits under MCL 206.30(9)(a).

For the next group, those born between January 1, 1946 and December 31, 1952, MCL 206.30(9)(b) eliminates the current exemptions for retirement and pension income. When the retirant reaches age 67, the Act allows a new exemption that will exempt a portion of pension and retirement income ($20,000 for a single return or $40,000 for a joint return), regardless whether the income is from a public or private pension. After the retirant reaches age 67, the Act maintains the same exemption amount but applies the exemption to all income, including retirement and nonretirement income. Regardless of date of birth, the Act eliminates the $20,000/$40,000 exemption if total household resources exceed $75,000 for a single return, or $150,000 for a joint return. The phrase "total household resources" in 2011 PA 38 is generally defined in terms of income.[9]

Finally, for current and future retirants born after 1952, MCL 206.30(9)(c), the Act eliminates any exemption of public or private pension or retirement income. Once the retirant reaches age 67, the Act replaces the standard personal exemption and allows a deduction ($20,000 for a single return or $40,000 for a joint return) against all types of income, including social security income and other types of income (including

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[9] The term "total household resources" for purposes of Public Act 38 of 2011 "means that term as defined in chapter 9," MCL 206.30(10)(b), and then chapter 9, MCL 206.508(4), defines "total household resources" as "all income received by all persons of a household in a tax year while members of a household, plus any net business loss after netting all business income and loss, plus any net rental or royalty loss, plus any deduction from federal adjusted gross income for a carryback or carryforward of a net operating loss as defined in section 172(b)(2) of the internal revenue code." MCL 206.508(4).

retirement and nonretirement income). The Act allows a retirant to forego the $20,000/$40,000 deduction and instead deduct 100% of social security income (MCL 206.30(1)(f)(iii)), and continue to claim the standard personal exemption (MCL 206.30(2)). If a retirant elects to claim the $20,000/$40,000 deduction, that retirant will not be allowed to claim either the deduction for social security income or the standard personal exemption. Again, regardless of date of birth, the Act eliminates the $20,000/$40,000 deduction if total household resources exceed $75,000 for a single return, or $150,000 for a joint return.

With respect to the standard personal exemption referred to in MCL 206.30(9)(c), Public Act 38 temporarily established the amount of the exemption, and then, like the exemptions for pension or retirement income, reduced or phased out the personal exemption for taxpayers based on household resources:

> (2) Except as otherwise provided in subsection (7), a personal exemption of $3,700.00 multiplied by the number of personal or dependency exemptions allowable on the taxpayer's federal income tax return pursuant to the internal revenue code shall be subtracted in the calculation that determines taxable income.
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> * * *
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> (7) . . . . For a taxpayer whose total household resources are $75,000.00 or more for a single return or $150,000.00 or more for a joint return, the personal exemption allowed under subsection (2) shall be adjusted by multiplying the exemption for the tax year for a single return by a fraction, the numerator of which is $100,000.00 minus the taxpayer's total household resources, and the denominator of which is $25,000.00, and for a joint return by a fraction, the numerator of which is $200,000.00 minus the taxpayer's total household resources, and the denominator of which is $50,000.00. The personal exemption allowed under subsection (2) shall not be allowed for a single taxpayer whose total household resources exceed $100,000.00 or for joint filers whose total household resources exceed $200,000.00. [MCL 206.30(2) and (7).]

In this way, MCL 206.30(7) imposes different tax treatment by reducing or eliminating the personal exemption based upon a taxpayer's total household resources.

These amendments to MCL 206.30 of the Income Tax Act of 1967 are scheduled to take effect January 1, 2012. See 2011 PA 38, enacting section 2, "(1) Except as otherwise provided under subsection (2), this amendatory act takes effect January 1, 2012."

Six days after signing Public Act 38, Governor Snyder exercised his authority under Const 1963, art 3, § 8, and requested this Court to issue an advisory opinion regarding the constitutionality of the amendments to MCL 206.30 discussed above. On June 15, 2011, this Court granted the Governor's request; articulated the questions to be addressed; requested the Attorney General file briefs both in support of and against the constitutionality of 2011 PA 38; and set oral argument in the matter for September 7, 2011.

In compliance with the Court's order, this brief argues that the reduction or elimination of the tax deduction for pension incomes contained in 2011 PA 38 and the determination of eligibility of income tax deductions for pensions on the basis of date of birth are *unconstitutional* under the Michigan and United States Constitutions.

STANDARD OF REVIEW

The question of the proper construction of the Constitution is a question of law that is reviewed de novo. *Goldstone v Bloomfield Twp Pub Lib*, 479 Mich 554, 558; 737 NW2d 476 (2007).

ARGUMENT

I. The elimination of the exemption from state income taxes for public pension plans violates art 9, § 24 of the Constitution by reducing the accrued financial retirement benefits for public employees.

A. Analysis

The Michigan Constitution guarantees that the accrued financial benefits of each public "pension plan and retirement system" shall not be diminished or impaired. For all public employees, the Legislature provided in MCL 206.30(1)(f) that the benefits from these public pensions would not be subject to income taxes by allowing for their deduction. The decision to eliminate this financial benefit, i.e., the deduction from income tax, and to apply it to the pension payments arising from the work of public employees already performed, violates art 9, § 24. The right to the deduction attaches when the financial benefit accrues under art 9, § 24. Thus, eliminating the statutory deduction for certain public employees reduces their level of benefits. The Constitution is designed to protect public employees who have performed services in reliance on a prescribed level of benefits.

In the same way, the Legislature exempted retirement financial benefits from specific pensions from *any* taxation for State employees, public school employees, city library employees, legislative members, and judges. Like the general exemption from income taxes, these statutes are part of the "pension plan" for public employees as defined by the Michigan Constitution because they are an essential part of the equation for determining a retirant's particular level of benefits. Once the retirement benefit accrues, it cannot constitutionally be reduced by subjecting it to the income tax. The Legislature cannot impose an income tax on retirement benefits that have already accrued because this tax would diminish the retirement allowances for public employees. The Legislature can only tax pension benefits that have not accrued, applying the tax prospectively either to new employees, or to existing employees for benefits that are not yet accrued.

The claim that there is no violation of the Michigan Constitution because there is no reduction in the retirement benefit until after its distribution is unavailing. The income tax is directed at the retirement benefit itself. If this Court allows the Legislature to circumvent the constitutional protection in art 9, § 24, then the protection against the diminishment of financial benefits is meaningless. There is no difference between increasing a contribution as a condition of receiving one's accrued financial benefit and requiring a public employee to remit a portion after its distribution. The Legislature cannot indirectly achieve what the Constitution has directly forbidden.

1. Art 9, § 24 protects public pensions from income taxes, because the exemption is an accrued financial benefit of retirement plans for public employees.

The Michigan Constitution guarantees that the right to public pension financial benefits that has accrued is a "contractual" right that cannot be diminished:

> The *accrued financial benefits* of each pension plan and retirement system of the state and its political subdivisions shall be a *contractual obligation* thereof which shall not be *diminished or impaired* thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities. [Const 1963, art 9, § 24 (emphasis added).]

In examining constitutional language, this Court endeavors to understand the intent of the ratifiers – the people – in adopting the Constitution. *Studier v Michigan Pub Sch Employees' Retirement Bd*, 472 Mich 642, 656; 698 NW2d 350 (2005). This is accomplished by giving the language of the Constitution its ordinary, plain meaning unless technical, legal terms were employed. *Studier*, 472 Mich at 652. The plain language is the general standard because it enables the Court to understand the interpretation that would have been given to the Constitution by the people themselves. *Wayne County v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). In this way, the constitutional convention debates are helpful in determining the intent of the ratifiers. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

The constitutional provision, art 9, § 24, is designed to accomplish two things. In the first paragraph, the Constitution guarantees that the Legislature cannot diminish or impair accrued financial benefits. *Advisory Opinion re Constitutionality of 1972 PA 258 ("Advisory Opinion 1972 PA 258")*, 389 Mich 659, 663; 209 NW2d 200 (1973).[10] This is also true for future collective bargaining agreements. *Detroit Police Officers Assoc v City of Detroit*, 391 Mich 44, 69; 214 NW2d 803 (1974). In the second paragraph, this Constitutional provision ensures the financial solvency of the public pension system by requiring the funding for the benefits to occur within that year and by preventing these funds from being used for the obligations on pensions of retirees that arose before the 1963 Constitution. *Jurva v Attorney General*, 419 Mich 209, 225;

[10] An advisory opinion is not precedentially binding in the same way as a decision of this Court on the merits. *Cassidy v McGovern*, 415 Mich 483, 495; 330 NW2d 22 (1982), modified on other grounds, *DiFranco v Pickard*, 427 Mich 32, 50-51; 398 NW2d 896 (1986).

351 NW2d 813 (1984), citing *Kosa v State Treasurer*, 408 Mich 356, 367-368; 292 NW2d 452 (1980). See also *Shelby Police & Fire Retirement Board v Shelby Township*, 438 Mich 247, 255-256; 475 NW2d 249 (1991). The issue here, however, focuses on the language of the first paragraph.

Regarding the right of public employees to receive their pension benefits undiminished, this Court noted that before art 9, § 24, pension obligations were not contractual ones, but rather, mere "gratuitous allowances":

> It had long been the general rule that pensions granted by public authorities were not contractual obligations but gratuitous allowances which could be revoked at will by the authority because the pensioner was not deemed to have had any vested right in their continuation. [*Advisory Opinion 1972 PA 258,* 389 Mich at 662.]

When introducing this provision at the Constitutional Convention, Delegate Van Dusen explained that this section would provide security that the public employees would receive a "prescribed" level of benefits:

> Now, it is the belief of the committee that the benefits of pension plans are in a sense deferred compensation for work performed. And with respect to work performed, it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed.
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> * * *
>
> *[W]hat it does mean is that once an employee has performed the service in reliance upon the then prescribed level of benefits, the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing the plan.* This is the first section. It confers the contractual right. It should confer upon public employees a considerably greater degree of security with respect to the knowledge that they will receive the benefits when the time comes. [1 Official Record Constitutional Convention 1961, p 771 (emphasis added).]

Thus, this Constitutional provision changed the basis on which public employees received their pensions from a mere gratuity, to one of contractual right. This section protects pension benefits. *Tyler v Livonia Pub Schs*, 459 Mich 382, 396; 590 NW2d 560 (1999). This Court recognized that the Legislature could impose new conditions on public employees to obtain accrued financial benefits, unless these conditions were "unreasonable and hence subversive of the constitutional protection." *Advisory Opinion 1972 PA 258*, 389 Mich at 664 (increase of $84 per year in contribution by some public employees to equalize their contributions with other employees would not violate art 9, § 24).

The primary statute at issue in this case is MCL 206.30, as amended by 2011 PA 38. The State of Michigan instituted an income tax for the first time in 1967. See MCL 206.1 *et seq*. In 1969, the Legislature amended the Income Tax Act of 1967 to include a specific exemption from income taxes for public pensions, which before its amendment by 2011 PA 38 provided:

> (1) "Taxable income" means, for a person other than a corporation, estate, or trust, adjusted gross income as defined in the internal revenue code subject to the following adjustments under this section:
>
> * * *
>
> (f) Deduct the following to the extent included in adjusted gross income:
>
> (i) Retirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state. [MCL 206.30(1)(f).][11]

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[11] The 1969 amendment did not include the pensions of federal employees. In 1989, the United States Supreme Court concluded that this exclusion of federal employees from this tax exemption violated 4 USC 111 by favoring retired state and local government employees over retired federal employees. *Davis v Michigan Dep't of Treasury*, 489 US 803, 817; 109 S Ct 1500; 103 L Ed 2d 891 (1989). The Michigan Court of Appeals on remand determined that the exemption should be extended to

This provision thereby governs all public employees who receive pension benefits. Under 2011 PA 38, the Legislature purported to withdraw this benefit for retirants born in 1946 or after and applied the tax to retirement benefit payments that have already accrued instead of limiting the Act to only financial benefits that will accrue in the future. MCL 206.30(9). The new scheme creates three categories of retirants, based on their date of birth, continuing the deduction for those born before 1946, limiting the deduction for those born in 1946 through 1952, and completely eliminating the deduction for those born after 1952 until they reach the age of 67. MCL 206.30(9)(a), (b), and (c).

a. The right to the deduction from income tax for pension income is protected by art 9, § 24's guarantee that "accrued financial benefits" cannot be diminished.

The key words of art 9, § 24, "accrued" and "financial," are not technical terms, and may be interpreted according to their ordinary meaning. *Studier*, 472 Mich at 652-653. The term "diminished" is also an ordinary word that may be applied according to its plain meaning, and carries the same meaning here as "reduction."

(1) The right has accrued.

The right to this deduction, effectively exempting pension income from state income taxes for public employees, has "accrued" for retirants and for existing public employees where their pension has vested. "Accrued" includes the concept of "vest as a right." *Studier*, 472 Mich at 653, citing *Webster's Third New Int'l Dictionary* (1961),

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federal employees, see *Davis v Dep't of Treasury (On Remand)*, 179 Mich App 683, 689; 446 NW2d 531 (1989), and the statute was then later amended to include federal employees.

p 13. Once a public employee has performed the work and established a pension benefit, art 9, § 24 protects the employee's expectation that the level of benefits will not be reduced. The constitutional section was established as a matter of justice, to safeguard the retirement security of public employees, and to allow public employees to rely on a specific level of payments in retirement without facing post-hoc reductions.

The central concern of art 9, § 24 is the specific level of benefits. See *Kosa*, 408 Mich at 371 (referring to the right to receive "certain pension payments"), citing *Advisory Opinion 1972 PA 258*, 389 Mich at 662-663. This makes sense because retirants need to be able to plan their retirement and know what their income will be once they discontinue working. This is one of the primary factors that public employees consider in determining the timing of their retirement.[12] The public employees performed the work relying on a particular level of benefits. 1 Official Record Constitutional Convention 1961, p 771 ("the service in reliance upon the then prescribed level of benefits"). For accrued benefits, this right is a constitutional one, and is inviolate.

Of course, as a general rule, taxpayers do not have a vested right in a tax statute or in the continuation of a tax law. *Midland Cogeneration Venture Limited Partnership v Naftaly*, 489 Mich 83, __; ___ NW2d __ (2011) (2011 WL 1991219, *3). And this Court has defined "vested right" as "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Midland*, *3, quoting *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135

12 State employees were invited to retire as part of an "early out," relying on a specified level of income.

(1994)(internal quotes omitted). But this general rule does not apply where the right is protected by the Constitution. See OAG, 1991-1992, No. 6697, p 118 (December 18, 1991)("*Unless* an exemption from taxation is rooted in the constitution . . . the Legislature may limit or withdraw the exemption")(emphasis added). And the right of vested public employees to deduct their pension income from their tax base for state income taxes is rooted in the Constitution, because the accrued financial benefit of their pension plans may not be diminished under art 9, § 24.

In other words, art 9, § 24 guarantees that the right to this deduction is protected once the retirement allowance accrues, not when the public employee receives the specific payment. The expectation of this level of benefits – unreduced by taxes – is established by statute, and once the work is performed and the benefit accrues, it cannot later be diminished, *Assoc of Prof and Technical Empl v City of Detroit*, 154 Mich App 440, 446; 398 NW2d 436 (1987)(noting that Constitution was designed to "protect pension related to work already performed"). This deduction is an integral part of determining the level of retirement benefit. As already noted, this section protects rights established by the Legislature. 1 Official Record Constitutional Convention 1961, p 771 ("the employee has the contractual right to receive those benefits under the *terms of the statute* or ordinance prescribing the plan" (emphasis added)). This Court has noted that art 9, § 24 binds the Legislature and future collective bargaining agreements. See *Advisory Opinion 1972 PA 258*, 389 Mich at 663 noted that under this constitutional section "the *legislature* cannot diminish or impair accrued financial benefits" (emphasis added); *Detroit Police Officers Assoc*, 391 Mich at

69 ("those already covered by a pension plan are assured that their benefits will not be diminished by future collective bargaining agreements").

There is no limitation under art 9, § 24 on the government employer's ability to reduce the benefit structure for new employees before they begin and for any additional, unaccrued pension value for existing workers. See OAG, 1991-1992, No. 6997, at 119-121, quoting 1 Official Record, Constitutional Convention, 1961, p 771, Delegate Van Dusen ("Now this does not mean that a municipality or other public employing unit could not change the benefit structure of its pension plan so far as future employment is concerned.").

By establishing in MCL 206.30(1)(f) that public pension benefits are not included within taxable income, the Legislature created a right to a specified level of benefits, unreduced by income taxes, for accrued financial benefits under art 9, § 24. Once the "employee has performed the service in reliance upon" a "prescribed" level of benefits and the benefits accrue, art 9, § 24 guarantees that the level of benefits will not be diminished. 1 Official Record Constitutional Convention 1961, p 771. This safeguards public employees from legislation, as here, that would reduce their net income after they have already retired in reliance on a particular level of income.[13]

[13] Even if the tax deduction is examined as distinct from the "accrued financial benefit," the analysis would yield the same result. The Legislature cannot reduce an accrued financial benefit, see *Advisory Opinion 1972 PA 258*, 389 Mich at 662-663, and subjecting these pension benefits to the income tax would do just that. Under this analysis, the tax deduction in MCL 206.30 as well as the other specific exemption statutes for particular public employees would be unnecessary because the Legislature could not diminish the pensions even in the absence of a statute shielding them from tax.

(2) The right is financial.

The statutory right to a deduction under MCL 206.30(1)(f) for retirement benefits for a public employee's state income taxes is also a "*financial* benefit." The statute shields a pension from being reduced by state income taxes, and, therefore, there can be no dispute that the deduction is financial in nature. See *Studier*, 472 Mich at 655 ("the ratifiers of our Constitution would have commonly understood 'financial' to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits"); see also *Musselman v Governor of Michigan*, 448 Mich 503, 528; 533 NW2d 237 (1995)(*Musselman I*) (Riley, J., dissenting)("[t]he term 'financial' is understood to involve actual money"). By exempting these pensions from income taxes, MCL 206.30 provides a financial benefit, i.e., that retirement income will not be reduced by the income tax.

Attorney General Frank Kelley reached the same conclusion that a right to be free from taxation was financial in nature, and recognized that it fits within the scheme of "financial benefits":

> [T]here is little question that an exemption from taxation for pension benefits constitutes "financial benefits" within the meaning of Const 1963, art 9, Sec. 24, since the exemption usually will result in greater net pension payments for the recipient. In Robert Tilove's treatise, Public Employee Pension Funds (1976), cited with approval by Justice Williams for the unanimous Court in *Kosa v State Treasurer*, 408 Mich 356, 372 n 22; see also pp 372-373; 292 NW2d 452 (1980), the author, Tilove, in referring to public pension income tax exemptions generally, states: *"[a]n income tax exemption has precisely the same effect as a benefit."* (At p 244.) [OAG, 1991-1992, No. 6697, p. 118 (emphasis added).]

The bottom line is that the income tax exemption creates an expectation of the retirement benefit level that a retirant will receive.

(3) The accrued benefit is diminished by this Act.

Public Act 38's elimination and modification of this deduction for public employees diminishes their accrued financial benefits.

The Legislature has created a right for a specific level of retirement benefits, which it then has provided will not be reduced by State income taxes under MCL 206.30. This creates a specific level of benefits that retirants can calculate and rely on to determine when they will have adequate income to retire. The right to this specific level is enforced by art 9, § 24, which ensures that the level of benefits that public employees will receive, once settled, cannot be reduced. See *Seitz v Probate Judges Retirement Sys*, 189 Mich App 445, 454; 474 NW2d 125 (1991)("The [legislative] amendment may violate art 9, § 24, as applied to an individual judge where . . . the 1976 amendment and the effect of the . . . benefit cap would be to reduce the judge's state retirement benefit to an amount less than the amount to which the judge would have been entitled . . . before the enactment of the 1976 amendment."). That is the central point. Once the governmental employer has established a right to a particular level of benefits for its employees, and it has accrued to the employee, this level cannot be diminished without violating art 9, § 24 of the Constitution.

In guaranteeing that this amount will not be "diminished," art 9, § 24 does not restrict this protection to the period in which the governmental employer controls the benefit before its disbursement. In other words, anytime the retirement benefit is diminished contrary to the governmental employer's contractual obligations, there is a constitutional violation. The retirement payments cannot be reduced either before they are received or after.[14]

The elimination of this tax deduction significantly reduces a public employee's retirement benefits. For example, consider a state employee who is single, has a retirement income of $20,000 per year, was born in 1953, and has retired at 58 years old.[15] Public Act 38 of 2011 eliminates any deduction for this employee until the person reaches the age of 67. Assuming no other income and deductions or exemptions, this employee will have to pay $870 a year in additional taxes ($20,000 multiplied by 4.35%) for nine years, totaling more than $7,500 over that time period. This loss in income is far more than the $84 a year that this Court determined to be reasonable and not "subversive of the constitutional protection." *Advisory Opinion*, 389 Mich at 663-664. Rather, this is more like the yearly contribution of 5% of the salary for State employees and public school employees that the Attorney General indicated would be unreasonable, estimating that the yearly cost would be on average $1,200. OAG, 1985-1986, No. 6294, p 71 (May 13, 1985).

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[14] This Court's analysis in *Tyler* does not suggest a different result. *Tyler*, 459 Mich at 385. In *Tyler*, this Court determined that a statute that coordinated workers' compensation benefits with pension benefits did not violate art 9, § 24 because "the amount paid as a pension benefit [did] not change," the workers' compensation benefit did. *Id.* at 396. But the Act here does reduce the pension benefit. Rather than reducing another source of income, the Act subjects retirement benefits to income tax.

[15] According to the reports generated by the State Employees' Retirement System (SERS) and Michigan Public School Employees' Retirement System (MPSERS), this retirement allowance fits within the yearly average retirement income for State employees ($18,511) and public school employees ($20,321). Attachment A, MPSERS Annual Actuarial Valuation Report, D-2, and Attachment B, SERS Annual Actuarial Valuation Report, D-2.

b. The right to exemption from income tax is a part of the "pension plan and retirement system."

The right to receive a pension undiminished by the state income tax is a part of the "pension plan and retirement system" for public employees. This is true even though the amendment to the Income Tax Act of 1967 occurred and became effective in 1969 after the adoption of art 9, § 24 in the 1963 Constitution. Again, certain public employees – State employees, public school employees, city library employees, legislative members, and judges – have specific exemption from taxes for retirement allowances. See MCL 38.40(1), 38.705(1), 38.1057(1), 38.1346(1), and 38.2670(1). The financial rights established by the pension plans and retirement systems that were then in place are enforced by art 9, § 24, as are new benefits that are created either by statute or by contract. In this way, the creation of vested benefits under art 9, § 24 is a one-way ratchet.

This Court explained this point in examining a challenge to a change in pension pay for retired judges. *Campbell v Michigan Judges Retirement Bd*, 378 Mich 169, 177-178; 143 NW2d 755 (1966)(Dethmers, J., lead opinion, joined by Kavanagh, C.J., and Smith, J., O'Hara, J.). The suit was brought as an impairment of contract claim. *Campbell*, 378 Mich at 180-181. The judges who had retired before 1960 argued they should be receiving half ($7,500) of the current judges salary ($15,000) as their retirement pay as opposed to half ($6,250) of the salary ($12,500) they were receiving at the time of their retirement. Their claim was based on a 1956 statute, known as the "escalator clause," that tied the amount of the pension to increases which might later be granted. *Id.* at 178. This Court determined that the rights once vested could not be diminished by subsequent legislative action. *Id.* at 181-182, 189. Significantly, the lead opinion for the Court explained that the Legislature could enhance, but not diminish, these rights:

> We hold that a valid contract was entered into between judges and the State, that the State's agreement thereunder to pay the judges certain benefits created vested rights for the judges upon their retirement, that these are enforceable and cannot be impaired or diminished by the State. *This should be deemed to include not only the benefits provided by statute at the time of entry into the contract and of retirement, but, also, those later added by statutory amendment.* The legislature may add to but not diminish benefits without running afoul of constitutional prohibition against impairment of the obligation of a contract. [*Campbell,* 378 Mich at 181 (Dethmers, J.)(emphasis added).]

The same is true here.

By creating this right to receive a deduction from their state income taxes for retirement income in MCL 206.30(1)(f), the Legislature ensured that public employees would have an enforceable right to this financial benefit for any additional pension value they would accrue under art 9, § 24. The right to this financial benefit, once established, cannot later be reduced without violating art 9, § 24.

Significantly, this right to a deduction in the state income tax is a part of the retirement system. Although the statute appears as a deduction in the Income Tax Act, at MCL 206.30(1)(f), it also operates directly with the specific pension plans throughout the statutory code. There are at least nine independent pension plans defined by statute: (1) State Employees' Retirement Act, MCL 38.01 *et seq*; (2) Fire Fighters and Police Officer Retirement Act, MCL 38.551 *et seq*; (3) City Library Employees' Retirement System, MCL 38.701 *et seq*; (4) Michigan Legislative Retirement System Act, MCL 38.1001 *et seq*; (5) Public School Employees Retirement

Act, MCL 38.1301 *et seq*; (6) Municipal Employees' Retirement Act, MCL 38.1501 *et seq*; (7) State Police Retirement Act, MCL 38.1601 *et seq*; (8) Judges Retirement Act; MCL 28.2101 *et seq*, and (9) the County Pension Plan Act , MCL 46.12a. See OAG, 1991-1992, No. 6697, p 117 ns. 3 and 4.

Because art 9, § 24 protects the benefit structure of these pension plans, the statutory provision that establishes that this baseline may not be reduced through income taxes is an inseparable part of the financial benefit of these pension plans. The fact that art 9, § 24 stands outside a particular legislative pension scheme is not controlling where the primary analysis examines the financial aspects of the benefits, i.e., "pertaining to monetary receipts and expenditures." *Studier*, 472 Mich at 655, quoting Random House American College Dictionary 453 (1964).

As *Studier* makes clear, the benefits of the "retirement system" governed by the pension protection section are *financial* benefits. The fact that retirement allowances are not subject to Michigan's income tax is one of the basic components in determining a retirant's level of benefits. The system of determining the ultimate benefits to the retirant includes the fact that there is no reduction for state income taxes. The exemption from state income taxes is an essential part of the equation. The ordinary understanding of "system" is a "coordinated body of methods, or a complex scheme or plan of procedure[.]" American College Dictionary 1230 (1961). This is exactly what the tax deduction statute provides – one of the basic elements for the method of determining a retirant's level of benefits. The tax deduction is a part of the system of determining the retirement benefits, i.e., is a part of the retirement system.[16]

2. Art 9, § 24 protects pensions from all taxes for State employees, public school employees, city library employees, legislative members, and judges.

This same argument that art 9, § 24 enforces the deduction from state income taxes under MCL 206.30 applies with even greater force for State employees, public school employees, city library employees, legislative members, and judges.[17] Each of

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[16] The conclusion of the former Attorney General on this issue – that the MCL 206.30 deduction does not create an enforceable right under art 9, § 24 – is not persuasive:

> [I]t is clear that such benefit cannot be a contractual obligation protected by Const 1963, art 9, Sec. 24. This is so because, as noted above, benefits intended to receive constitutional protection are limited to those arising "under the terms of the statute or ordinance prescribing the plan." 1 Official Record, [] pp 770-771. The Income Tax Act of 1967 establishes and is intended to regulate solely a system for income taxation. The amendment of such act to provide for a general exemption for all public pension plan benefits post-dated and was in no way directly connected with the statutory establishment of the various public retirement plans. It follows, therefore, that the income tax exemption conferred by the Income Tax Act of 1967 was not intended to be nor may it be interpreted to be a benefit under the terms of the statute "prescribing the plan." [OAG, 1991-1992, No. 6997, p 119.]

This conclusion did not have the benefit of this Court's analysis in *Studier* and its two decisions in *Musselman* on the meaning of "accrued financial benefits." Contrary to the Attorney General's opinion, there is a direct connection between this statute providing for deduction of retirement income from the income tax and the level of benefits to which a retirant is entitled. As this Court made clear in *Studier*, the paramount issue is the level of monetary benefits that the retirant can rely on receiving.

[17] These public employees comprise approximately half of all public employees according to a report generated by Genesis Consulting, May 9, 2011, introduced before the Senate in its review of HB 4361. It reports a total of 1.1 million current and retired public employees, with approximately 475,000 State employees and school teachers, and with another estimated 500,000 city employees. See Attachment C.

these pension retirement schemes includes a particular, specific exemption from all taxes for these public employees. And, except for the judge's exemption, the basic substance of these provisions – which are virtually identical to one another – was in place before the adoption of the 1963 Michigan Constitution. The other retirement plans do not include this specific exemption. See OAG, 1991-1992, No. 6997, p 117.[18]

Consistent with 2011 PA 38, 2011 PA 41-45 amended each of these five statutes to reflect that beginning January 1, 2012, the accrued benefits are subject to tax upon their distribution. For State employees, legislative employees, public school employees, and judges, the amendment provides that the retirement allowance is "subject to tax upon the distribution" to the person from the fund. MCL 38.40(2); 38.1057(2); 38.1346(2); and 38.2670(2).[19] The amendments do not limit the application of the tax to benefits that have not yet accrued, but purport to apply to pension benefits that have already accrued.

But each of the statutory provisions – like MCL 206.30 – provides that the retirement benefits will not be subject to governmental taxes. Art 9, § 24 operates to guarantee and enforce these rights for accrued financial benefits. That is, once vested, these monetary payments cannot be diminished.

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[18] Although four of these statutory provisions in the retirement schemes were established before the institution of Michigan's income tax, the federal income tax was imposed on state and local governmental employees in 1939, see *Davis*, 489 US at 810, and the Sixteenth Amendment gave the United States Congress the authority to levy income taxes in 1913, US Const, Am XVI. See also n 2 above regarding efforts before 1967 in Michigan to establish an income tax.

[19] For the city library employees, the amendment provides that "annuities payable to the members of staff are subject to state taxes." MCL 38.705(2).

a. Art 9, § 24 guarantees that the "accrued financial benefits," including the fixed statutory exemptions, cannot be diminished.

These five categories of public employees – like all public employees – have come to rely on a particular level of benefits. This point was articulated at the Convention:

> [W]hat we are trying to deal with here are those financial benefits which have accrued. Once the employee, by working pursuant to an understanding *that this is the benefit structure presently provided, has worked in reliance thereon*, he has the contractual right to those benefits which may not be diminished or impaired. [1 Official Record Constitutional Convention 1961, pp 774.]

See also *Kosa*, 408 Mich at 371 ("accrued financial benefits is defined as the "right to receive *certain* pension payments upon retirement, based upon service performed")(emphasis added). The work has already been performed. The service has been rendered. *Assoc of Prof and Technical Employees*, 154 Mich App at 446 (holding that the City's creation of a new minimum age requirement in order to receive vested pension benefits violated art 9, § 24). Art 9, § 24 forbids any effort to now take away, i.e., *reduce*, the accrued benefit of these public employees. This applies to both retired and current employees whose benefits have accrued. See *Assoc of Prof and Technical Employees*, 154 Mich App at 446 ("we find that the financial benefits of a pension plan accrue while the employee performs his work for the public employer.").

Studier's analysis of the financial benefit of MCL 206.30 is applicable here. The protection from all taxation for the five statutes is an "accrued financial benefit." Because the pension benefit has accrued, the monetary level has been set. The five pension statutes establish that this level will not be reduced by governmental taxation. Moreover, these public employees have justifiably come to rely on this level of payments without a reduction from taxation. The elimination of the exemption reduces the level of benefits. This certainly "pertains to money matters," see *Studier*, 472 Mich at 655, and is relevant for the monetary payments because they will be reduced if subject to taxation. Art 9, § 24 guarantees that the benefit structure, i.e., the "accrued financial benefits," is protected and cannot be diminished.

b. The right that these five statutes provide to exemption from taxation is a part of the respective "pension plan and retirement system."

The conclusion that these five statutes are within the "pension plan and retirement system" under art 9, § 24 is even stronger than for the deduction in MCL 206.30. Two basic points support this conclusion.

First, each of these statutes is in fact located within the specific statutory scheme for these pension plans and retirement systems. There can be no dispute that art 9, § 24 contemplates not merely the specific contractual provisions that give rise to the pension plan and retirement system but also the statutory provisions created by the Legislature. See *Advisory Opinion 1972 PA 258*, 389 Mich at 663 ("the *legislature* cannot diminish or impair accrued financial benefits" (emphasis added)). See also 1 Official Record Constitutional Convention 1961, p 771 ("the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing the plan").

Second, this exemption directly affects the amount of benefits a retirant will receive from each of these plans. Because these plans are exempt from taxation, the public employee is thereby constitutionally guaranteed a specified level of benefits in retirement for work that has been performed. By eliminating this exemption from taxation and by subjecting this income to the State income tax, the Legislature diminished the amount of the benefits. This is exactly what art 9, § 24 was designed to prevent. Indeed, the purpose of art 9, § 24 was to make sure that these public employees would not have their set level of pension benefits reduced after the fact, after they have already performed the work and after they relied on a specific amount of money. *Advisory Opinion 1972 PA 258*, 389 Mich at 663-664. But this is what 2011 PA 38 and the corresponding amendments in 2011 PA 41-45 intend to do.

This conclusion is supported by the analysis of the Oregon Supreme Court in examining virtually the same statutory language and whether the elimination of the exemption from tax operated as an impairment of contract. *Hughes v State of Oregon*, 314 Or 1; 838 P2d 1018, 1021-1022 (1992).[20] In finding that the elimination of this exemption violated the right of public employees to be free of an impairment of contract, the Oregon Court noted that the statutory provision was "an essential part" of the contract:

> [T]he fact that [exemption statute] was enacted as part and parcel of the Public Employe[e]s' Retirement Act of 1953 lead to a conclusion that [the statute] is a term of the larger PERS contract. Only by looking at the statute in isolation, as the state asks us to do, could one escape this conclusion. Such an exercise, however, is not analytically proper or helpful. Consequently, we hold that PERS was intended to be and is a contract between the state and its employees, and *that [the statute], enacted as an essential part of and within the context of that contract, is a term of that contract*. [*Hughes*, 838 P2d at 1032 (emphasis added).]

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20 But other State courts found to the contrary. See Issue II.

The same analysis is applicable here for these five statutes.[21]

3. The right is not protected by merely ensuring that the retirant receives the pension undiminished at the time it is subject to taxation.

By discontinuing the statutory exemptions and the right to deduct income received from a pension plan, the amendments that correspond to 2011 PA 38, 2011 PA 41-45, state that the payments are subject to tax upon "distribution." See MCL 38.40(2); 38.1057(2); 38.1346(2); and 38.2670(2).[22] This language suggests that the Legislature may believe that the "accrued financial benefits" have not been diminished because they were only reduced *after* they were given to the retirant. This is the basis on which the Ohio Supreme Court rejected an impairment of contract challenge to the action of its Legislature to eliminate the exemption from income taxes for public employees:

> Admittedly the net bankable retirement income might be the same whether the rate of a pension is reduced, or a tax is levied on such income. However, there is a definite legal distinction between reducing the rate of a pension and levying a tax upon the income received from that pension. The vesting statutes prohibit only a reduction in the rate of

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21 There are at least four other states with similar constitutional provisions: Alaska, Hawaii, Illinois, and New York. In each, the state constitution guarantees that the retirement benefit is "contractual" and cannot be "diminished or impaired." See AK Const, Art 12, § 7, Hawaii Const, Art 16, § 2, IL Const, Art 13, § 5, and NY Const, Art 5, § 7. None of these states has apparently addressed the issue of whether the elimination of a statutory right to a tax exemption would violate the constitutional protection against the reduction of accrued benefits. Each, however, has concluded, like Michigan, that the right to accrued benefits cannot be reduced by the Legislature. *Sheffield v Alaska Pub Employees' Assoc*, 732 P2d 1083, 1085 (AK 1987); *Kaho'ohanohano v State of Hawaii*, 114 Hawaii 302; 162 P3d 696, 736 (2007); *Felt v Bd of Trustees of Judges Retirement Sys*, 107 Ill2d 158; 481 NE2d 698, 700 (1985); and *Ballentine v Koch*, 89 NY2d 51; 674 NE2d 292, 294 (1996).

22 The revision to MCL 38.705(2) for city library employees merely indicated that their annuities were "subject to state taxes."

> payment. They do not prohibit the imposition of a tax. [*Herrick v Lindley*, 59 Ohio St 2d 22; 391 NE 2d 729, 733 (1979).]

But this distinction is unavailing here.

Art 9, § 24 guarantees that the right to "accrued financial benefits" for public employees will not be reduced. It does not restrict this protection to the time before the distribution of the benefit. The section is designed to guarantee a certain level of benefits upon retirement for work performed where the right to a retirement benefit has vested. See *Kosa*, 408 Mich at 371. This enables the public employee to rely on a particular income in retirement. Thus, *Herrick* is distinguishable because Ohio does not have the specific constitutional guarantee that Michigan established in art 9, § 24.

Moreover, in the same way the State cannot tax this vested benefit after its distribution, the governmental employer could not require the public employee to return a portion of the benefit by a unilateral change in the contract terms in collective bargaining. There is no difference in requiring a new contribution to qualify for "accrued financial benefits," see OAG, 1985-1986, No. 6294, p 71 (concluding that imposing a 5% contribution to the retirement fund without any corresponding benefit would violate art 9, § 24), and in requiring public employees to give back part of their retirement benefits as a contribution after distribution. The Constitution limits attempts by both the Legislature and the government employer to reduce accrued benefits through collective bargaining or by changing in its charter. *Detroit Police Officers Assoc*, 391 Mich at 69 ("those already covered by a pension plan are assured that their benefits will not be diminished by future collective bargaining agreements"); *Assoc of Prof and Technical Empl*, 154 Mich App at 442 (new condition imposed in the city charter). Likewise, there is no difference in imposing a tax on the pension benefit before its distribution or after its distribution.

In either case, the reduction is to the retirement benefit. The public employee has taken no action to subject the benefit to taxation. The liability attached by the mere fact of receiving the pension in Michigan.[23] This is no different than a city amending its city charter to require a public employee to make a 5% contribution to the city to pay for the cost of administering the retirement program. The effect is identical. The public employee's protected right to a specific income had been reduced merely because the employee has received the benefit. But the Legislature may only alter this benefit for services that have yet to be rendered. It cannot constitutionally impose a reduction to accrued financial benefits. Otherwise, art 9, § 24 is meaningless.

II. The elimination of the exemption or deduction from state income taxes for income from pension plans of public employees violates art 1, § 10 by impairing the State's contractual obligations.

A. Analysis

The Michigan Constitution in art 9, § 24 provides that the pension plans and retirement systems create contractual obligations. Therefore, the legislative decision to allow public employees to deduct their income from pension plans from their income taxes under MCL 206.30, and to exempt from taxes the retirement allowances for State employees, public school employees, city library employees, legislative members, and judges, is contractual in nature. The effort to eliminate the exemption or

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23 The retired public employees of the State should not have to leave Michigan and relocate to Florida or another state that does not tax pension income in order to receive their pension benefits undiminished.

deduction for accrued financial benefits – effectively a retroactive change for the public employees – is an unconstitutional impairment of contract.

Other States that have examined this issue have generally rejected this conclusion, but they did not have Michigan's constitutional scheme. Thus, the arguments that there is no contract created, no authority for the sovereign to surrender its right to tax, and that the tax only occurred after distribution are unavailing. Consequently, this Court should find 2011 PA 38 unconstitutional.

1. Art 9, § 24 establishes that public employees have a contractual right.

The Michigan Constitution and the United States Constitutions both prohibit the State from impairing the obligations of contract:

> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted. [Const 1963, art 1, § 10.]
>
> No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts[.] [US Const, art I, § 10.]

The Michigan Constitution is interpreted to provide the same protection as the United States Constitution for the Contracts Clause. See *Studier*, 472 Mich at 360-361 (examining the two constitutional protections together).

The general standard for evaluating a claim under the Contracts Clause requires an analysis whether there has been a "substantial impairment of a contractual relationship." *General Motors Corp v Romein*, 503 US 181, 187; 112 S Ct 1105; 117 L Ed 2d 328 (1992)(internal quotes omitted), citing *Allied Structural Steel Co v Spannus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978). This evaluation requires an examination of three elements:

(1) whether there is a contractual relationship;

(2) whether a change in law impairs that contractual relationship; and

(3) whether the impairment is substantial. [*Romein*, 503 US at 186-187.]

Where the claim is that the State has formed this contract through the creation of a statutory right, there is a "strong presumption that statutes do not create contractual rights." *Studier*, 472 Mich at 661, citing *Nat'l RR Passenger Corp v Atchison, Topeka & Santa Fe RR Co*, 470 US 451, 465-466; 105 S Ct 1441; 84 L Ed 2d 432 (1985). The strict limitations on the ability of the State to bind itself in contract are based on the limit of one legislature to bind a future legislature and considerations of the sovereign prerogatives of State government. *Studier*, 472 Mich 660-661. For example, the Michigan Constitution protects the State's right to tax and provides that this right cannot be "surrendered, suspended or *contracted* away." Const 1963, art 9, § 2. Thus, this Court in *Studier* established the standards by which statutes should be evaluated to determine whether the Legislature clearly and unequivocally expressed its intention to be bound in the future to these rights as a matter of contract. *Studier*, 472 Mich at 661-662.

The starting point in determining whether statutory language creates a binding contract for the governmental employers is the statutory language itself. *Studier*, 472 Mich at 662. The Legislature must have used language that was "plain and susceptible of no other reasonable construction." *Studier*, 472 Mich at 662 (internal quotes omitted), citing *In re Certified Question (Fun 'N Sun RV, Inc. v Michigan)*, 447 Mich 765, 778, 527 NW2d 468 (1994). This Court examines the language to see if there was "actual intent." *Studier*, 472 Mich at 662. The matter has to be more than a matter of policy – it must establish a "vested right[]." *Id.* This Court included in the inquiry examples of the kind of phrases that one would expect to appear to establish this kind of right: "contract"; "covenant"; or "vested rights." *Id.* at 663-664.

Here, however, it is not necessary to examine the statutes themselves to determine whether the Legislature has intended to bind itself. Art 9, § 24 has already established that the "accrued financial benefits" of pension plans and retirement systems are a "contractual obligation." As already noted, this section includes rights established by the Legislature. 1 Official Record Constitutional Convention 1961, p 771 ("the employee has the contractual right to receive those benefits under the *terms of the statute* or ordinance prescribing the plan" (emphasis added). This Court has noted that this right binds the Legislature and future collective bargaining agreements. See *Advisory Opinion 1972 PA 258*, 389 Mich at 663; *Detroit Police Officers Assoc*, 391 Mich at 69. The language in art 9, § 24 ("contractual obligation") meets the standard for the kind of language that indicates a specific intention that the State is bound contractually. See *Studier*, 472 Mich at 663-664 n 22 (referring to statutory language that "[t]his act shall be deemed a contract" to be adequate to establish the right to contract).

In determining whether taxing pension benefits impairs the contractual relationship, the question is whether the statutes established "accrued financial benefits" that cannot be diminished under art 9, § 24. They did. This is true for all public employees under MCL 206.30(1)(f)(i), which provides that taxable income is deducted "to the extent" that pension benefits are "included in adjusted gross income on one's federal tax return." This is also true for State employees, public school employees, city library employees, legislative members, and judges under MCL 38.40(1), 38.705(1), 38.1057(1), 38.1346(1), 38.2670(1), which exempt pension benefits from all taxation. As argued in Issue I, see pp 17-23, these statutes create an accrued financial benefit that cannot be diminished.

This impairment is also substantial. As demonstrated by the example from p 23, the reduction of $870 per year relying on an exclusive income from retirement benefits of $20,000 is a significant reduction. See *Campbell*, 378 Mich at 181-182 (finding an impairment of contract for reduction of $1,250 per year, from $7,500 to $6,250).

Also, there is no conflict here between art 9, § 24's protection of the accrued financial retirement benefits of public employees and the limitation of the State on its ability to contract away its right to tax under art 9, § 2. In recognizing that this Court endeavors to read constitutional provisions in harmony with each other, *Thoman v Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946), overruled on other grounds, *Sch Dist of City of East Grand Rapids, Kent County v Kent County*, 415 Mich 381, 389; 330 NW2d 7 (1982), the specific provision governs over the general. See *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639, 272 NW2d 495 (1978) ("When there is conflict between general and specific provisions in a constitution, the specific provision must control."). Here, art 9, § 2 is a broad provision regarding the taxing authority of the State, while art 9, § 24 is very specific, limited to the accrued financial benefits of public employees in pension plans and retirement systems. The same principle governs the relationship between art 9, § 4 (tax exemption for non-profit religious and educational organizations) and art 9, § 2. Article 9, § 24 is therefore a limited exception to the broad principle of art 9, § 2.

2. The other State courts that have examined this issue were not dealing with a constitutional provision such as art 9, § 24.

The other States that have examined this issue, Colorado, Georgia, Maine, Montana, New Mexico, Ohio, Oregon, and Rhode Island have generally rejected the claim that there is a violation of the impairment of contract. See *Spradling v Colorado Dep't of Revenue*, 870 P2d 521, 524 (Colo App 1993); *Parrish v Employees' Retirement Sys*, 260 Ga 613, 398 SE2d 353, 354 (1990); *Blair v State Tax Assessor*, 485 A2d 957, 960 (ME 1984); *Sheehy v Public Employees Retirement Division*, 262 Mont 129; 864 P2d 762, 765-776 (1993); *Pierce v State of New Mexico*, 121 NM 212; 910 P2d 288, 294 and 294 n 2 (1995); *Herrick v Lindley*, 59 Ohio St 2d 22, 28, 391 NE2d 729, 732-733 (1979); and *Linnane v Clark*, 557 A2d 477, 479-480 (RI 1989). But see *Hughes*, 838 P2d at 1021-1022. But these inquiries were not governed by a constitutional provision comparable to art 9, § 24. One court that found an impairment of contract, the Oregon Supreme Court, was examining virtually the same statutory language as the exemption language in the four statutes for the specific groups of public employees. See *Hughes*, 838 P2d at 1022. The Oregon Court persuasively determined that the revision violated its State Contracts Clause:

> Section 1, quite simply, eliminates the state's contractual obligation as to income taxes. The unilateral change worked by section 1, if permitted, would allow the state to subject formerly exempt PERS retirement benefits to state income taxes without contractual liability to petitioners-a result directly within the prohibition of Article I, section 21 [i.e., Oregon's Contracts Clause]. [*Hughes*, 838 P2d at 1035.]

Likewise, here, the unilateral change would subject formerly exempt vested benefits to a tax that the State had guaranteed would not be levied against public pension benefits. See MCL 206.30. See also MCL 38.40(1); MCL 38.705(1); MCL 38.1057(1); MCL 38.1346(1); and MCL 38.2670(1).

The conflicting decisions may be placed in three categories relevant to this inquiry, and distinguished.[24]

First, the New Mexico Supreme Court in *Pierce* determined that there was no constitutional contractual right established because "we find no express language that clearly and unambiguously creates private contractual rights." *Pierce*, 910 P2d at 299. See also *Sheehy*, 262 Mont 129; 864 P2d at 765 ("[t]he statute contains no manifestation of legislative intent to create private and enforceable contractual rights"). These cases are distinguishable, because art 9, § 24 contains the controlling language that demonstrates that the rights here are contractual in nature.

Second, the Georgia Supreme Court had rejected the claim based on the sovereign's authority to tax. *Parrish*, 398 SE2d at 354 ("If . . . [the Legislature] bestowed an irrevocable tax exemption upon the retirees, that tax exemption was invalid under the Georgia Constitution" because it has "no power to grant an irrevocable tax exemption"). See also *Blair*, 485 A2d at 960 ("[e]ven if we were to find the exemption to be a contractual right of state employment, the legislative grant of

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24 The Rhode Island Supreme Court found that its income tax act enacted in 1969 had repealed by implication the public employees' tax exemption. *Linnane*, 557 A2d at 479. Michigan amended its Income Tax Act in 1969 to shield pension income. See 1969 PA 332.

such a right would violate the Maine Constitution."). But as already noted, art 9, § 24 is an exception to art 9, § 2.

Third, and finally, the Ohio Supreme Court determined that there was a distinction between reducing the pension rate and levying a tax after its distribution. *Herrick*, 391 NE2d at 733. See also *Spradling*, 870 P2d at 524 (Co App 1994)("Because [the statute], as amended, does not reduce the amount of the pension benefits to which plaintiffs are contractually entitled, and because there is no contractual right to an income tax exemption for such benefits, we hold that the statute is not constitutionally invalid insofar as it subjects those benefits to state income tax"). As already noted in Issue I, pp 32-34, the Michigan Constitution in art 9, § 24 does not limit protection from diminishment to the time before its distribution. Public employees have relied on a set benefit structure – a particular level of benefits – and just as the State cannot reduce it before its distribution, see OAG, 1985-1986, No. 6294, p 71 (May 13, 1985), it cannot reduce it by requiring its remission after its distribution.

Thus, MCL 206.30 should not be allowed to go into effect because it is unconstitutional as applied to accrued financial benefits. It may be applied only prospectively – to new employees, and to existing employees for pension benefits that have not yet accrued – in order to meet constitutional requirements.

III. Public Act 38 determines eligibility for income tax exemptions and deductions on the basis of total household resources, which creates a graduated tax base in violation of the Constitution, art 9, § 7.

A. Analysis

Article 9, § 7 of the Michigan Constitution provides that "[n]o income tax graduated as to *rate or base* shall be imposed by the state or any of its subdivisions." (Emphasis added). Presently, Michigan pensioners may deduct their pension benefits either partially or completely from their tax base, without regard to their household income level, and taxpayers may claim personal exemptions regardless of their household income. But, effective January 1, 2012, Public Act 38 of 2011 will fully or partially eliminate these deductions and exemptions based on the taxpayer's "total household resources," which by definition amounts to the taxpayer's household income. By doing so, the Legislature has, for the first time, unconstitutionally conditioned entitlement to a tax exemption or deduction on income level.[25] The Constitution prohibits the Legislature from graduating a tax rate or base depending on a taxpayer's income level. The result of this amendment is a graduated tax base, in violation of art 9, § 7.

1. Exemptions and deductions reduce a taxpayer's tax base, whereas a credit does not change the taxpayer's tax base.

The 1963 Constitution does not define "graduated tax rate" or "graduated tax base." Likewise, Michigan courts have not defined the terms. "A court may consult dictionary definitions when terms are not expressly defined by a statute." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). Black's Law Dictionary defines a

[25] No other exemption or deduction in the Income Tax Act is made available or limited based on income level.

graduated tax as a "[t]ax structured so that the rate increases as the amount of income of taxpayer increases." Black's Law Dictionary (5th Ed, 1983). It does not define "graduated tax base." In Michigan, a taxpayer's tax base is the taxpayer's taxable income, defined as "adjusted gross income as defined in the internal revenue code subject to the following adjustments under this section . . . ." MCL 206.30(1). Thus, the calculation of an individual's Michigan tax base begins with the taxpayer's federal adjusted gross income and ends after the subtraction of deductions prescribed by MCL 206.30. A graduated tax base, then, would result when exemptions or deductions are made available unequally, based on the taxpayer's personal income level.

The definitions of tax exemptions and deductions are a threshold point. A tax deduction and tax exemption both affect a taxpayer's tax base before arriving at taxable income. Black's Law Dictionary efficiently explains a tax deduction as follows:

> A subtraction from revenues and gains to arrive at taxable income. Tax deductions are technically different from tax exemptions, but the effect of both is to reduce gross income in computing taxable income. Both are different from tax credits, which are subtracted from the computed tax itself in determining taxes payable. [Black's Law Dictionary (5th Ed, 1983).]

In other words, tax exemptions and tax deductions affect a taxpayer's tax base. A tax *exemption* means that the affected income was never subject to tax and not included in the taxpayer's tax base. A tax *deduction* allows income that would otherwise be included in the taxpayer's tax base to be subtracted from the taxpayer's tax base, thus decreasing the tax base – and, consequently, the resulting liability after the tax rate is applied to the base. In contrast, a tax *credit* is subtracted after all calculations of tax base and tax liability have concluded and does not affect the taxpayer's tax base. In this way, a deduction and an exemption are distinct from a credit. At issue here are exemptions and deductions.

Not all deductions will be fully available to every taxpayer, even if they are not graduated by income level. Because a deduction operates as a subtraction from taxable income, one must necessarily first have taxable income equal to the deduction from which to perform the subtraction.[26] Consequently, if the amount of taxable income reported by a taxpayer is less than the available deduction amount, the taxpayer will only be able to take a deduction equal to the amount of taxable income the taxpayer reported. This does not, however, create a graduated tax base, because the deduction remains available to each taxpayer equally, assuming that the taxpayer has the necessary income from which to deduct it.

The same analysis applies to exemptions. But here, a taxpayer who has taxable income sufficient to offset the deduction cannot claim it, because the Legislature has prohibited the higher income taxpayer from claiming the deduction – allowing only lower income taxpayers to claim the benefit of the deduction. This creates the prohibited graduated tax base.

[26] This is as compared to a refundable credit, to which a taxpayer is entitled regardless of taxable income or tax liability. Any amount of the credit that does not operate against the taxpayer's liability is refunded.

2. The Constitution prohibits the Legislature from graduating a taxpayer's tax base based on income, which is what 2011 Public Act 38 does.

Before 2011 PA 38, MCL 206.30 provided for personal exemptions and deductions of some or all received pension benefits. Personal exemptions were available without regard to household income level. Pension benefits received from a public retirement system created by a federal, state, or local governmental unit were completely deductible under MCL 206.30(1)(f)(i). Benefits from a private pension were partially deductible under MCL 206.30(1)(f)(v).

Public Act 38 of 2011 places restrictions on the exemptions and deductions based on date of birth, marital status, and household income. MCL 206.30(7), as amended, provides that personal exemptions are limited based on the taxpayer's income level. MCL 206.30(9), as amended, limits the deduction for pension income to taxpayers with a certain birth date, marital status, and income level. The amendments restrict or disallow the exemptions and deductions for higher income taxpayers, versus lower income taxpayers. The result of these amendments is a graduated tax base, resulting in taxpayers with higher income paying a proportionately higher tax liability.

Both MCL 206.30(7) and MCL 206.30(9) define the respective exemption or deduction in terms of "total household resources." The definition of this phrase makes clear that it is essentially a taxpayer's income. The definition appears in the property tax credit chapter under MCL 206.508(4):

> (4) "Total household resources" means all income received by all persons of a household in a tax year while members of a household, plus any net

> business loss after netting all business income and loss, plus any net rental or royalty loss, plus any deduction from federal adjusted gross income for a carryback or carry forward of a net operating loss as defined in section 172(b)(2) of the internal revenue code.[27]

In this way, the total resources are calculated by including income and adjusting for business income, rental and royalty losses, and federal deductions. The lion's share of this amount is thereby determined by one's income.

The Constitutional Convention comments to art 9, § 7 make clear that the intent of the drafters was to prevent a graduated income tax system like that used by the federal government. Convention Comment to art 9, § 7, referencing 1 Official Record, Constitutional Convention 1961, p 854.[28] Under the federal system, the rate of tax paid by a taxpayer increases as the taxpayer's income increases. For example, a taxpayer who has $100,000 per year in income has a proportionately higher tax burden than a taxpayer who has $50,000 per year in income. The drafters of the Michigan Constitution sought to prevent this very outcome. *Id.*

The inclusion of a prohibition on a graduated tax *base* in art 9, § 7 was important to avoid the effect of a graduated tax rate by manipulation of taxpayers' tax base. As Delegate Van Dusen explained:

> Without the words "or base" you do not really have any protection against an indirectly graduated state income tax, because a flat rate tax imposed upon the federal tax liability would simply pick up all the graduation of the federal liability. Without these words "or base" there is no question but what in my judgment a nominally flat rate tax could be made a

[27] This section takes effect January 1, 2012.

[28] "The provision makes it clear that neither the state nor any local unit of government may impose a graduated income tax. The words "or base" are necessary to prevent "piggyback" taxation based on the federal tax liability. Without such language, a tax nominally imposed at a flat rate might actually adopt all the graduation of the federal tax." 1 Official Record, Constitutional Convention 1961, p 854.

> graduated income tax. [*Id.* at 52-53, quoting 1 Official Record, Constitutional Convention 1961, p 894.]

Not only did the drafters of the Constitution desire to prevent a graduated tax rate, they also desired to prevent circumvention of this rule by manipulation of the tax base.

This Court has previously recognized that determining eligibility for tax exemptions or deductions by income level would violate the Constitution. In *Butcher v Dep't of Treasury*, 425 Mich 262; 389 NW2d 412 (1986), this Court accepted the implication to that effect of this Court in *Kuhn v Dep't of Treasury*, 384 Mich 378; 183 NW2d 796 (1971). The *Butcher* Court stated:

> It is clear that in *Kuhn*, by closely examining the credits, exclusions, and exemptions there challenged, we at least implied that *a constitutional violation can occur by the use of income criteria for determining their amounts*. The reduction of a credit, as in the case before us, would be no exception to such an implication, if, as appears at first blush here, it was determined that such a reduction was influenced by income bracketing, and such factors affected the income tax liability. [*Butcher*, 425 Mich at 273 (emphasis added).]

The *Kuhn* Court held that different rates may be applied to different classifications of taxpayers – i.e., individuals as against corporations – without violating art 9, § 7. The *Butcher* Court held that a credit that is provided regardless of income level and does not affect a taxpayer's tax base does not violate art 9, § 7. Neither of these situations is present here. Instead, this case squarely implicates the *Butcher* and *Kuhn* Courts' statement that an income-dependent exemption or deduction that affects income tax liability *would* violate art 9, § 7.

The *Butcher* Court considered whether an amendment to the Income Tax Act that reduced the local property tax credit based on the taxpayer's income violated the constitutional prohibition against a graduated income tax rate. This Court determined there was no constitutional violation because "the property tax credit is payable to the property taxpayer irrespective of state income tax liability . . . ." *Butcher*, 425 Mich at 264. Therefore, the Court held that "an income-graduated reduction in that credit does not conflict with the constitutional prohibition against a graduated income tax." *Id.* at 264.[29]

Attorney General Frank Kelley specifically considered whether an exemption or deduction would violate art 9, § 7, if it was graduated by income level, and opined that it would. In OAG, 1965-1966, No. 4428, pp. 50, 51 (March 31, 1965), the Attorney General examined the following question:

> Under the provisions of §§ 3 and 7, Article IX, Constitution of 1963, can the legislature, in enacting an income tax statute, classify taxpayers as natural persons, corporations and financial institutions, and apply different rates, exemptions and/or deductions to each class?

In addition to the plain language of art 9, § 7, the Attorney General considered the Constitutional Convention Record. Based on the legislative record, the Attorney General opined that the term "base" in the restriction on graduated taxes was included for the purpose of prohibiting "graduation by indirection." OAG No. 4428, p 52. The Attorney General further stated that "[g]raduation as to base means producing the effect of a tax graduated as to rate by reducing the tax base for lower incomes and increasing it for higher incomes received by a particular class of taxpayers within a tax period." *Id.* at p 53.

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[29] Moreover, the Michigan Court of Appeals found that a similar credit did not violate art 9, § 7 because it did not "directly or indirectly" create a graduated tax rate or base. *Rosenbaum v Dep't of Treasury*, 77 Mich App 332, 336; 258 NW2d 216 (1977). Rather, the *Rosenbaum* Court noted, "Once the credit is computed it is allowed without regard to the taxpayer's income." *Id.*

The Attorney General cogently explained that the constitutional restriction prohibits "the imposition of an income tax law that would have the effect of imposing a graduated tax with rates increasing as taxable income increases," and that "the result forbidden by the Constitution is the imposition of a proportionately greater income tax burden on the income of high income groups than on that of low income tax groups." OAG No. 4428, p 53.

The Attorney General thus recognized, like Delegate Van Dusen before him, that the Legislature may not, without violating art 9, § 7, enact a law that manipulates taxpayers' tax base such that high income individuals incur a proportionately higher tax liability than lower income individuals. Yet, this is exactly what 2011 PA 38 does.

The issue in this case is not a credit that is subtracted from a taxpayer's tax liability, as in *Butcher*. Nor is it whether the Legislature may set different rates for business as against individual taxpayers. Rather, the issue is an exemption or a deduction that operates as a subtraction from the taxpayer's tax base, upon which his tax liability is calculated, and that is only available to certain taxpayers, depending on how much income they report for the tax year. Public Act 38 of 2011 is an income-graduated mechanism to determine who is entitled to an exemption or deduction that directly impacts the taxpayer's income tax base, and – consequently – indirectly affects the taxpayer's tax liability. The result is a graduated tax base, which violates art 9, § 7 and is unconstitutional.

IV. Determining eligibility for income tax deductions on the basis of date of birth and marital status, as described in MCL 206.30(9), violates equal protection of the law under both the Michigan and the United States Constitutions.

A. Analysis

Regardless of this Court's determination whether the reduction or elimination of the statutory income tax deduction for public pension incomes diminishes accrued financial benefits; impairs a contract obligation; or creates a constitutionally impermissible graduated income tax, MCL 206.30(9), as amended, is invalid as violative of the Equal Protection Clauses of the Michigan and the United States Constitutions.[30] The Michigan Legislature acted outside its authority and violated state and federal equal protection guarantees when it set up eligibility for income tax deductions strictly on the basis of date of birth.

Const 1963, art 1, § 2 provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin. The legislature shall implement this section by appropriate legislation.

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30 Although not among the questions asked, MCL 206.30(9), as amended, also violates Michigan's Uniformity of Taxation Clause, Const 1963, art 9, § 3. In cases involving taxing statutes, there is no discernible difference between the equal protection and uniformity of taxation clauses of our State Constitution, or between the federal Equal Protection Clause and Michigan's Uniformity of Taxation Clause. *TIG Ins. Co v Dep't of Treasury*, 464 Mich 548; 629 NW2d 402 (2001). Uniformity of taxation as required by the State Constitution means that the legislature may not treat differently for tax purposes things that are essentially the same. *Avis Rent-A-Car System, Inc v City of Romulus*, 65 Mich App 119; 237 NW2d 209 (1975), aff'd 400 Mich 337; 254 NW2d 555. Here, as in *Avis*, there is no reasonable relationship between MCL 206.30(9)'s distinction among public pensioners and the tax exemption scheme imposed. 65 Mich App at 128.

The wording of the Equal Protection Clause of the U.S. Constitution is almost identical in providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV, § 1.

As Justice Markman noted in his concurrence in *Sharp v City of Lansing*, 464 Mich 492; 629 NW2d 873 (2001), "the reference to equal protection 'of the laws,' found in both the state and federal constitutions, suggests a safeguard against the formation *and execution* of laws *or legislative classification schemes* that operate unequally." *Sharp*, 464 Mich at 817 (Markman, J., concurring) (emphasis added). Indeed, "art 1, § 2 *commands* the Legislature to adopt measures to practically implement its equal protection guarantees." *Sharp*, 464 Mich at 802 (emphasis added). The Legislature cannot "trump" the Michigan Constitution. *Sharp*, 464 Mich at 810. Yet that is exactly what the Legislature did when it took a state constitutional right – the right of Michigan citizens to receive their public pension undiminished once they retire – and classified taxation of that right based on date of birth and marital status.

Under MCL 206.30(9)'s statutory scheme, retirees 67 and older by December 31, 2012 (in other words, those born before 1946) will receive the current deductions. As a result, income from their public pensions will not be subject to taxation. Those who reach age 60 through 66 by December 31, 2012 (in other words, born in 1946 through 1952) will have a $20,000 single/$40,000 joint retirement income deduction in addition to Social Security exemption and personal exemption until age 67. After they turn 67, they will receive $20,000 single/$40,000 joint special senior deduction against all income in addition to Social Security and personal exemptions. Pensioners younger than 60 on December 31, 2012 (born after 1952) will receive *no* deduction until they turn 67. After they turn 67, they will receive a $20,000 single/$40,000 joint special senior deduction against all types of income. This deduction can be taken instead of the Social Security and personal exemptions if it would result in more generous tax treatment. MCL 206.30(9).

The irony of this scheme is twofold. First, its classification for full tax relief – because it is based on date of birth rather than age – is "closed." In other words, it is *never* open to entry by pensioners who reach the age of those who qualify for the full tax deduction in 2012. For example, an individual born in 1946, who will be 66 in 2012, cannot enter the fully immune class even when he turns 67, the same age at which pensioners born before 1946 are eligible for full tax relief. Second, marital status may provide entry in this otherwise closed class. Thus, a much younger pensioner, who would not otherwise qualify for full tax relief, gains full pension protection simply by virtue of marriage to someone born before 1946. This is because, for married couples filing jointly, MCL 206.30(9) bases the modifications in the deduction allowed for pension and retirement income not on each individual with income on the tax return but instead on *the age of the older spouse* when the return is filed. MCL 206.30(9)(d).

1. Public Act 38 fails the applicable strict scrutiny standard under the Equal Protection Clause of the Michigan Constitution.

Our state constitution provides a basis for application of strict scrutiny.

a. Strict scrutiny applies because under our state constitution, the receipt of an undiminished public pension is a fundamental right.

Although the right to receive a public pension upon retirement is neither a federally recognized fundamental right[31] nor a fundamental right in most other states, where pension guarantees are statutory,[32] Michigan is different. Michigan public pension incomes constitute a accrued financial benefit guaranteed by the Michigan Constitution under art 9, § 24. Thus, Michigan has elevated public pensions to a fundamental right.

This Court may determine that a provision in the Michigan Constitution should be interpreted or applied differently than a parallel provision in the federal constitution. *Doe v Dep't of Soc Servs*, 439 Mich 650, 674; 487 NW2d 166 (1992), citing *City of Mesquite v Aladdin's Castle, Inc*, 455 US 283, 293; 102 S Ct 1070; 71 L Ed 2d 152 (1982). Any classifications that provide Michigan citizens with unequal protection of the fundamental right to receive an undiminished public pension upon retirement must be reviewed under strict scrutiny – that is, the classifications must be drawn with great precision. *San Antonio Indep Sch Dist v Rodriquez*, 411 US 1, 17; 93 S Ct 1278; 36 L Ed 2d 16 (1973); *Doe*, 439 Mich at 662.

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31 Under the United States Constitution, a fundamental right is one that is explicitly or implicitly guaranteed by the Constitution. *San Antonio Indep Sch Dist v Rodriquez*, 411 US 1, 33 (1973). The right to receive a pension upon retirement is neither.

32 Four other states – Alaska, Hawaii, Illinois, and New York – have constitutional provisions protecting accrued financial benefits.

b. The State's interests in enacting the income tax provisions on public pensions in 2011 PA 38 are not compelling and do not justify the State's discrimination based on date of birth or marital status.

Under the strict scrutiny standard, this Court must consider whether the claimed governmental interest is compelling and the classification scheme has been precisely tailored to serve a compelling governmental interest. *Doe*, 439 Mich at 662, citing *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982).

A review of the legislative history of MCL 206.30(9) reveals two general State interests: (1) addressing the State's fiscal problems by creating an environment for job growth, Michigan Tax Reform Proposal, "Why we're doing this;"[33] and (2) creating a personal income tax scheme that is more fundamentally fair than the previously existing scheme. *Id.*[34]

As to the first interest, the fiscal crisis is not the first and likely not the last. The State will always have a financial justification to support its actions, and such an interest is not compelling enough to justify classification of a fundamental right.

Regarding the second interest, under the Governor's Tax Reform proposal, one of the reasons for eliminating the deductions is to "eliminate inequities in the current retirement income exemption." Committee on Tax Reform, 4/20/2011 HB 4361 and

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33 www.house.mi.gov.

34 Legislative analyses are "generally unpersuasive tool[s] of statutory construction." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). "Nevertheless, '[c]ourts may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions.' " *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 546; 716 NW2d 598 (2006) (citation omitted).

4362, Lt. Governor Brian Calley, Update on the tax and budget plan, "Michigan Tax Reform Proposal," "Fair."[35] The Governor states he wants to "treat all individuals and businesses fairly." *Id.* According to the Governor, "[e]xisting preferences have unfairly distorted the tax burden under the personal income tax and created a system of winners and losers." *Id.*

In contrast to this clearly stated goal, the new plan takes public pensioners, who are similarly situated and were similarly treated under the old scheme, and treats them unequally. The elimination of the pension deduction based on date of birth purportedly "protect[s] senior pensioners" who were born before 1946. But this places a greater burden on those whose birth dates fall in 1946 or later, but are otherwise similarly situated in all relevant respects – in other words, also receiving a public pension. Some senior pensioners do not need "protecting" to the same extent as less senior pensioners who might have a smaller public pension. And in this difficult economy, pensioners born in 1946 or after cannot count on finding full-time or part-time work to supplement the income they will lose due to unanticipated taxation of their public pension. Moreover, the classifications as drawn do not protect all senior pensioners equally. As previously noted, a pensioner who reaches the age of 67 after December 31, 2012 is subject to greater taxation than a pensioner who reached age 67 before that date.

The very inequity the Legislature intended to cure has been exacerbated by the income classifications of MCL 206.30(9). In its presentation to the Legislature, the

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35 www.house.mi.gov; www.senate.mi.gov.

governor's office used the following example of "fundamental unfairness" to demonstrate its rationale for implementing its tax changes, including taxation of public pension income: a non-senior couple with children whose household income is $10,000 less than that of a senior couple with a household income made up largely of pension income and social security would have a far greater tax liability than the senior couple. "Michigan Tax Reform Proposal," "The Inequity of Fully Exempting Retirement Income – Example from Real Tax Returns," April 20, 2011.[36] But that inequity still exists under the Public Act 38 of 2011. A couple whose relevant birth date for purposes of the tax deduction falls before 1946 could still have a smaller tax liability than a couple with less household income. Equally unfair, a public pensioner born in 1946 or later who is married to someone born before 1946 attains the full tax relief that the 67-year-old born in 1946 or after who is not married – or not married to someone with the "right" birth date – can never attain.

In short, the classification of public pensions based on date of birth does not spread the sacrifice equally among those who are similarly situated. Instead, it treats similarly situated pensioners who have reached the same age differently and gives special status to a select group of pensioners born in 1946 or after who happen to be married to someone born before 1946. Thus, contrary to the State's asserted goal, the classification is fundamentally unfair.

In sum, the State's interests do not justify MCL 206.30(9)'s discriminatory classifications.

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[36] www.house.mi.gov; www.senate.mi.gov.

c. Classifications based on date of birth or marital status are not necessary or narrowly tailored to accomplish the State's purposes.

Where the State's interest is an immediate fiscal crisis, a classification that exempts pensioners with certain birth dates or certain marital status is not necessary to achieve this goal. Nor is it narrowly tailored to meet the State's asserted fiscal interests.

Neither is the classification narrowly tailored to meet the fundamental fairness purpose. Classification based on birth date or marital status does not solve potential unfairness between pensioners and non-pensioners. Instead, it makes treatment of public pensions less fundamentally fair than the prior scheme by:

- creating a "closed" class of 67+-year-olds that no "new" 67+-year-olds can ever enter, making the statute underinclusive; and
- creating an exclusive class of pensioners born in 1946 or after who can access full pension income tax deduction simply because of their marital status to someone born before 1946, making the statute overinclusive.

In sum, MCL 206.30(9)'s classifications based on date of birth and marital status do not meet the strict scrutiny test. Therefore, the provision, as amended, is unconstitutional under the Equal Protection Clause of the Michigan Constitution.

2. Alternatively, the 2011 PA 38 fails the rational basis test and thus violates the equal protection guarantees of the Michigan and United States Constitutions.

If this Court rejects strict scrutiny analysis, MCL 206.30(9)'s classification based on date of birth and marital status still does not pass constitutional muster under either the Michigan Constitution or the U.S. Constitution.

Absent a fundamental right or a suspect classification, the test of whether a government classification violates the constitutional guarantees of equal protection is whether the classification has a rational basis. *Rodriguez*, 411 US at 40. The fundamental rule of classification is that it shall not be arbitrary, must be based on substantial distinctions, and must be germane to the purpose of the law. *Kelley v Boyne*, 239 Mich 204, 214; 214 NW 316 (1927). In determining what is within legislative discretion, as opposed to what is arbitrary, there must be a relation between the classification and the purposes of the act in which it is found. *Fox v Employment Security Comm'n*, 379 Mich 579; 153 NW2d 644 (1967). Under rational basis, courts must ask "whether all persons of the same class are included and affected alike, or are immunity and privileges extended to an arbitrary or unreasonable class while denied to others of like kind." *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 16; 714 NW2d 664 (2006).

Here, the Legislature's classification scheme based on date of birth and marital status is not germane to the aims sought to be achieved: solutions to the current and ongoing state fiscal crisis and fundamental fairness. It takes a group of "like kind" individuals – those receiving public pensions, who in all respects relevant to the statute are similarly situated – and extends the full privileges and advantages of a public pension to only one portion of the group. Pensioners born before 1946 are not a distinct class for purposes of the goals of the statute. Nor are those pensioners born between January 1, 1946 and December 31, 1952 a distinct class as compared to pensioners with birth dates after 1952. Finally, pensioners born after 1946 who are married to someone born before 1946 are not distinct from pensioners with the same birth date but a non-qualifying spouse. There are no justifiable, reasonable, or substantial differences among the pension plans of these individuals of varying birth dates or marital status. Certainly, there are no differences that suggest the necessity of different treatment based on date of birth or marital status.

More fundamentally, even if this Court determines that the goal of protecting more senior pensioners age 67 and over could reasonably justify the discrimination, there is no justification in creating a closed class. The classifications do not meet that goal because they do not offer that protection to *all* public pensioners who reach age 67 – in other words, to all who are similarly situated. Instead, they create a closed class that "new" 67-year olds can never enter. Conversely, the classifications extend the full tax deduction to an exclusive class of pensioners born in 1946 or later who do not necessarily need additional protection because of their age but who happen to be married to someone born before 1946. This exclusive class is most similarly situated to other less senior pensioners born in 1946 or after, or to other married pensioners whose spouses were born in 1946 or after, yet is treated differently. And contrary to the goal of protecting more senior pensioners, this exclusive class of pre-1946 birth dates can enter the otherwise "closed" class of those who reach age 67 by December 31, 2012, while those who reach age 67 after that date are forever barred from entry.

In short, these classifications are both underinclusive and overinclusive, and thus, arbitrary. See *Fox*, 379 Mich 579 (classifications of persons applying for benefits under the Michigan Workers Compensation Act were unreasonable because there was no justifiable and rational relationship between the classifications created by the statute and the purpose of the statute, which was to prevent duplication of benefits and the paying of weekly – as opposed to lump sum – payments). Through these classifications, the State is creating the very scenario it purported to fix.

MCL 206.30(9), as amended, fails the rational basis test because no set of facts can be reasonably conceived to justify its discriminatory classifications. Accordingly, 2011 PA 38 must be invalidated under Equal Protection Clauses of both the Michigan and U.S. Constitutions.

RELIEF SOUGHT

This Court should conclude that 2011 PA 38 is unconstitutional.

Respectfully submitted,

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ATTACHMENT A

Retirees and Beneficiaries – Historical Comparison

Year Ended September 30	Rolls End of Year Number	Rolls End of Year Annual Benefit[1]	Annual % Increase Number	Annual % Increase Benefits	Average Annual Benefit
1991	86,253	$ 749,717	3.6%	9.2%	$ 8,692
1992	90,201	831,290	4.6	10.9	9,216
1993	93,574	911,686	3.7	9.7	9,743
1994	97,989	1,018,819	4.7	11.8	10,397
1995	103,151	1,141,972	5.3	12.1	11,071
1996	107,465	1,251,811	4.2	9.6	11,649
1997	111,842	1,371,479	4.1	9.6	12,263
1998	116,620	1,505,362	4.3	9.8	12,908
1999	120,913	1,639,825	3.7	8.9	13,562
2000	126,115	1,798,028	4.3	9.6	14,257
2001	130,790	1,943,444	3.7	8.1	14,859
2002	135,277	2,094,382	3.4	7.8	15,482
2003	139,814	2,251,766	3.4	7.5	16,105
2004	145,378	2,431,636	4.0	8.0	16,726
2005	151,706	2,644,700	4.4	8.8	17,433
2006	157,163	2,828,460	3.6	6.9	17,997
2007	162,844	3,013,075	3.6	6.5	18,503
2008	167,265	3,171,261	2.7	5.3	18,960
2009	171,922	3,336,165	2.8	5.2	19,405
2010	187,722	3,814,755	9.2	14.3	20,321

[1] *In thousands of dollars.*

ATTACHMENT B

Retirees and Beneficiaries – Historical Comparison

Year Ended September 30	Number Added	Number Removed	Rolls End of Year Number	Rolls End of Year Annual Benefit[1]	% Increase in Annual Benefits	Average Annual Benefit
1991			25,566	$194,928	7.9 %	$ 7,625
1992			28,856	243,612	25.0	8,442
1993			29,175	257,193	5.6	8,816
1994	1,888	1,101	29,962	273,387	6.3	9,124
1995	1,566	966	30,562	290,694	6.3	9,512
1996	1,595	1,064	31,093	307,933	5.9	9,904
1997	6,098	1,068	36,123	421,060	36.7	11,656
1998	1,279	1,217	36,185	432,456	2.7	11,951
1999	1,409	1,248	36,346	444,167	2.7	12,221
2000	1,540	1,181	36,705	463,969	4.5	12,640
2001	1,648	1,242	37,111	471,407	1.6	12,703
2002	3,806	1,251	39,666	546,968	16.0	13,789
2003	6,448	623	45,491	708,607	29.6	15,577
2004	1,561	1,433	45,619	729,087	2.9	15,982
2005	1,542	1,360	45,801	747,428	2.5	16,319
2006	1,728	1,549	45,980	769,096	2.9	16,727
2007	2,206	1,300	46,886	802,018	4.3	17,106
2008	2,653	1,461	48,078	842,612	5.1	17,526
2009	2,423	1,472	49,029	880,763	4.5	17,964
2010	2,937	1,504	50,462	934,092	6.1	18,511

[1] *Amounts shown in thousands of dollars.*

Note: Data related to additions and removals before 1994 is not available.

ATTACHMENT C

	State Employees Retirement System			Michigan Public School Er *MPSERS*			*Tot Both*	St Police	Judges	*Total*	Municipal	Federal	Federal	Total	Grand Tot	Estimated	Grand
	Active SERS Members Actual	Retired Members Actual	*Act&Ret By County* Actual	Active Members Actual	Retired Members Actual	*Act&Ret By County* Actual	*Act&Ret By County* Actual	Active & Ret Estimate	Active & Ret Estimate	*All State Systems*	Active & Ret Estimate	Active Estimate	Retired Estimate	Federal Estimate	All Public Active & Ret	Adult Dependents	Total All Act & Est
Manistee	150	194	*344*	538	603	*1,141*	*1,485*	14	2	*1,501*	1,566	251	147	398	3,465	2,252	5,717
Marquette	473	732	*1,205*	1,696	1,794	*3,490*	*4,695*	43	8	*4,745*	4,951	793	465	1,258	10,954	7,120	18,075
Mason	83	188	*271*	919	805	*1,724*	*1,995*	18	3	*2,016*	2,104	337	198	535	4,655	3,026	7,680
Mecosta	49	192	*241*	1,111	1,392	*2,503*	*2,744*	25	4	*2,773*	2,893	464	272	736	6,402	4,162	10,564
Menomin(	25	80	*105*	492	421	*913*	*1,018*	9	2	*1,029*	1,073	172	101	273	2,375	1,544	3,919
Midland	120	153	*273*	2,182	1,633	*3,815*	*4,088*	37	7	*4,132*	4,311	691	405	1,096	9,538	6,200	15,738
Missaukee	28	80	*108*	313	293	*606*	*714*	7	1	*722*	753	121	71	191	1,666	1,083	2,749
Monroe	183	295	*478*	4,111	2,204	*6,315*	*6,793*	62	11	*6,866*	7,163	1,147	673	1,821	15,849	10,302	26,152
Montcalm	349	457	*806*	1,693	1,248	*2,941*	*3,747*	34	6	*3,787*	3,951	633	371	1,004	8,743	5,683	14,425
Montmorc	31	76	*107*	152	316	*468*	*575*	5	1	*581*	606	97	57	154	1,342	872	2,214
Muskegon	482	861	*1,343*	4,559	3,316	*7,875*	*9,218*	84	15	*9,317*	9,720	1,557	914	2,471	21,508	13,980	35,487
Newaygo	49	133	*182*	1,185	861	*2,046*	*2,228*	20	4	*2,252*	2,349	376	221	597	5,198	3,379	8,577
Oakland	1,486	3,100	*4,586*	30,022	20,193	*50,215*	*54,801*	499	88	*55,388*	57,785	9,257	5,432	14,689	127,862	83,110	210,973
Oceana	42	113	*155*	786	665	*1,451*	*1,606*	15	3	*1,623*	1,693	271	159	430	3,747	2,436	6,183
Ogemaw	43	111	*154*	473	415	*888*	*1,042*	9	2	*1,053*	1,099	176	103	279	2,431	1,580	4,011
Ontonagoi	21	43	*64*	160	201	*361*	*425*	4	1	*430*	448	72	42	114	992	645	1,636
Osceola	46	144	*190*	687	614	*1,301*	*1,491*	14	2	*1,507*	1,572	252	148	400	3,479	2,261	5,740
Oscoda	18	49	*67*	175	173	*348*	*415*	4	1	*419*	438	70	41	111	968	629	1,598
Otsego	74	168	*242*	625	612	*1,237*	*1,479*	13	2	*1,495*	1,560	250	147	396	3,451	2,243	5,694
Ottawa	198	499	*697*	7,642	4,168	*11,810*	*12,507*	114	20	*12,641*	13,188	2,113	1,240	3,352	29,181	18,968	48,149
Presque Is	30	74	*104*	278	388	*666*	*770*	7	1	*778*	812	130	76	206	1,797	1,168	2,964
Roscomm	104	308	*412*	623	878	*1,501*	*1,913*	17	3	*1,933*	2,017	323	190	513	4,463	2,901	7,365
Saginaw	381	439	*820*	5,123	3,486	*8,609*	*9,429*	86	15	*9,530*	9,942	1,593	935	2,527	22,000	14,300	36,300
Saint Clai	180	344	*524*	4,506	3,002	*7,508*	*8,032*	73	13	*8,118*	8,469	1,357	796	2,153	18,740	12,181	30,922
Saint Jose	31	118	*149*	1,514	1,054	*2,568*	*2,717*	25	4	*2,746*	2,865	459	269	728	6,339	4,121	10,460
Sanilac	28	90	*118*	1,209	882	*2,091*	*2,209*	20	4	*2,233*	2,329	373	219	592	5,154	3,350	8,504
Schoolcra	53	106	*159*	192	197	*389*	*548*	5	1	*554*	578	93	54	147	1,279	831	2,110
Shiawasse	343	428	*771*	2,131	1,263	*3,394*	*4,165*	38	7	*4,210*	4,392	704	413	1,116	9,718	6,317	16,034
Tuscola	218	666	*884*	1,727	1,112	*2,839*	*3,723*	34	6	*3,763*	3,926	629	369	998	8,687	5,646	14,333
Van Burei	137	315	*452*	2,747	1,511	*4,258*	*4,710*	43	8	*4,760*	4,966	796	467	1,262	10,989	7,143	18,133
Washtena	494	936	*1,430*	8,620	4,954	*13,574*	*15,004*	137	24	*15,165*	15,821	2,535	1,487	4,022	35,007	22,755	57,762
Wayne	3,194	5,648	*8,842*	33,845	22,728	*56,573*	*65,415*	596	105	*66,116*	68,977	11,050	6,484	17,534	152,627	99,207	251,834
Wexford	120	271	*391*	961	679	*1,640*	*2,031*	18	3	*2,053*	2,142	343	201	544	4,739	3,080	7,819
Totals	25,454	42,825	*68,279*	242,782	163,118	*405,900*	*474,179*	4,318 *4,318*	762 *762*	*479,259*	500,000	80,100 Mi LMI	47,000	127,100	1,106,359	719,133	1,825,492

Compiled by: Genesis Consulting, Douglas C. Drake, dcdrake1@aol.com May 9, 2011

Notes on Sources and Methodology: Data on State Employees (SERS) and School Employees (MPSERS) is actual including the per county numbers, for the fiscal year ending 9-30-10, compiled from reports provided by the Office of Retirement Services. The numbers by county are actual, based upon on actual addresses. The numbers for State Police and Judges are from the Comprehensive Annual Financial Reports for the two systems, and are distributed by county in the same proportion as the totals for SERS and MPSERS. Only universities participating in MPSERS are included

Municipal retirees and actives are estimated in total from employment numbers published by the US Bureau of Labor Statistics, and the Michigan Labor Market Information Office.

The Municipal numbers were then distributed by county, again based upon the distribution of SERS and MPSERS actives and retirees.

Federal active numbers came from the same source as the municipal numbers. The retiree estimate was provided by a representative of federal retirees living in Michigan. The federal numbers were also distributed in the same proportion as the SERS and MPSERS members. The estimate of dependents was made by the author of this study, based upon census data